

OUTLINE OF ISSUES: ASTHMA

Employee sues Employer for failure to ban smoking or introduce other restrictions on smoking in the workplace resulting in an allegation that the employee developed '*asthma*' or suffered a permanent worsening of '*asthma*'.

General

The pathogenesis of asthma remains uncertain and it is difficult to find a definition that covers all people who may have the disease. In addition, the word '*asthma*' is frequently used loosely to mean both the disease itself and acute attacks of airways narrowing. It is believed that exposure to environmental tobacco smoke ("ETS") may precipitate airways narrowing in a small percentage of asthmatics. Such symptoms are reversible in the same way that symptoms triggered by exposure to cold air, perfume, fly spray, exertion etc are reversed spontaneously or with the use of bronchodilators. Circumstances involving acute episodes of airways narrowing are unlikely to give rise to legal proceedings. Of greater moment are allegations that the disease state itself or a chronic worsening of the disease state is caused by exposure to ETS. This outline is concerned with such allegations.

1. Duty of Care

There is circumstantial proximity but is there causal proximity? *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at 497.

If, as reported in recent medical literature, exposure to ETS operates no differently to other trigger factors - eg perfume, fly spray, cold air etc and does not result in a worsening of pulmonary function abnormalities or cause the disease of asthma in adulthood, it may be argued that there is no duty of care in respect of the alleged loss. Is there a duty on employers to prevent employees wearing perfume?

Factors which can cause occupational asthma in adulthood include working with western red cedar and toluene diisocyanate. ETS has not been categorised as capable of causing occupational asthma. This is a matter for expert testimony.

Progressive impairment of lung function in non-smoking asthmatics has been observed in a number of studies. This is observed more frequently in women than in men and appears to be related to the severity and duration of their asthma. The lung function of non-smoking asthmatics, as a group, declines more rapidly than that of so called '*normals*'. Expert evidence would show that such decline in lung function was due to the normal progression of asthma and is unrelated ETS.

2. Breach of Duty

- (a) Employee must prove employer knew or ought to have known, at a relevant point in time, that exposure to ETS in the workplace, could cause the underlying disease of asthma in adulthood or chronically worsen the asthmatic condition. Such knowledge is not consistent with expert knowledge/testimony.

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- (b) Employee must prove that the employer failed to take certain steps which would have avoided the injury. This may involve a consideration of ventilation systems, segregation of smokers and non-smokers etc. affecting the level of exposure.

3. Causation

The employee must prove that the employer's failure at the relevant time, caused the injury.

This may involve a consideration of:

- (a) the natural worsening of the plaintiff's asthma over time;
- (b) the adequacy of the plaintiff's medication and attention to monitoring and treatment of the disease over time; and
- (c) the plaintiff's exposure to other factors which might be significant with respect to the plaintiff's asthma eg ventilation of the plaintiff's home - dampness, house mites and other allergens.

4. Defences

Statutes providing time limitations and other restrictions on actions need to be considered and applied to the facts of the employee's claim.

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